

1 THE HONORABLE THOMAS S. ZILLY

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7 UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 ING BANK, a federal savings bank,

11 Plaintiff,

No. C09-124Z

12 vs.

ORDER

13 JACOB A. KORN, et al.,

14 Defendants.
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16 This matter comes before the Court on Plaintiff ING Bank's ('ING') motion for
17 partial summary judgment against Defendants Valeriy Nayberger, Dina Nayberger,
18 Nadezhda Sedneva, Sergey Kozhevnikov, Anastasia Tislenok, Oleg Tislenok, Petr
19 Klimenko, Tatyana Klimenko, Nikolay Klimenko, Kristina Klimenko, Anatoliy
20 Tislenok, Vera Tislenok, Wells Fargo & Company, Wells Fargo, N.A., Watermark
21 Credit Union, Alaska U.S.A. Federal Credit Union, Boeing Employee Credit Union, and
22 Westsound Bank,¹ docket no. 325. The Court previously granted the motion in part with
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26 ¹ Although ING brings its motion for summary judgment against "Westbound Bank," the Court assumes ING is referring to "Westsound Bank."

1 regards to Petr Klimenko, Tatyana Klimenko, Nikolay Klimenko, and Kristina
2 Klimenko, and junior lienholders or other parties claiming an interest in the Klimenko
3 property, Wells Fargo & Company and Wells Fargo, N.A., docket no. 334, and
4 requested proof from the remaining Defendant-borrowers (collectively“Borrowers”) that
5 they have the capacity to repay their loans, docket no. 335. Because none of the
6 Borrowers have the capacity to repay their loans, the Court hereby GRANTS ING’s
7 motion with regard to the remaining Defendants, Valeriy Nayberger, Dina Nayberger,
8 Nadezhda Sedneva, Sergey Kozhevnikov, Anastasia Tislenok, Oleg Tislenok, Anatoliy
9 Tislenok, Vera Tislenok, Watermark Credit Union, Alaska U.S.A. Federal Credit Union,
10 Boeing Employee Credit Union, and Westsound Bank.

13 **III. Background**

14 This case arises from an alleged scheme to defraud various mortgage lenders.
15 In its present Motion, ING is seeking summary judgment on its Breach of Loan
16 Documents/Judicial Foreclosure claims against Defendants. The facts pertaining to
17 each set of Defendants are as follows:

19 *1. The Anatoliy Tislenok and Vera Tislenok Loan*

20 Anatoliy and Vera Tislenok are the owners of real property located at 36030 21st
21 Lane South, Federal Way, Washington. Decl. of Brett L. Messinger in Supp. of Mot.
22 for Partial Summ. J. (Messinger Decl.’) Ex. 2 (docket no. 327). On May 2, 2008,
23 Anatoliy Tislenok obtained a loan from ING for \$720,000. Decl. of Thomas Houlihan
24 in Supp. of Mot. for Partial Summ. J. (Houlihan Decl.’) ¶ 7 (docket no. 326). In
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1 conjunction with the loan, he also executed a Note, and he and his wife Vera Tislenok
2 executed a Deed of Trust which provided ING a first priority security interest in the
3 property, which ING duly recorded. Messinger Decl. Ex. 2; Houlihan Decl. ¶ 8, Exs.
4 4 & 5.
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6 Mr. Tislenok defaulted on his loan obligations beginning on July 1, 2008, by
7 failing to make required monthly payments. Houlihan Decl. ¶ 9. As a result, ING
8 accelerated the balance of the loan of \$907,439.88 under the Deed of Trust. Houlihan
9 Decl. ¶ 10, Ex. 6. ING now claims that it is now entitled to foreclosure on its security
10 interest, and that to the extent that Watermark Credit Union claims any interest in the
11 property, such interest is not superior to ING. Messinger Decl. Ex. 2.
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13 2. *The Anastasia Tislenok Loan*

14 Anastasia and Oleg Tislenok are the owners of real property located at 36058
15 21st Lane South, Federal Way, Washington. Messinger Decl. Ex 3. On March 3,
16 2008, Anastasia Tislenok obtained a loan from ING for \$740,000. Houlihan Decl.
17 ¶ 12. In conjunction with the loan, she also executed a Note, and she and her husband
18 Oleg Tislenok executed a Deed of Trust which provided ING a first priority security
19 interest in the property, which ING duly recorded. Messinger Decl. Ex. 3; Houlihan
20 Decl. ¶ 13, Exs. 7 & 8.
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23 Mrs. Tislenok defaulted on her loan obligations beginning on June 1, 2008, by
24 failing to make required monthly payments. Houlihan Decl. ¶ 14. As a result, ING
25 accelerated the balance of the loan of \$928,273.28 under the Deed of Trust. Houlihan
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1 Decl. ¶ 15, Ex. 9. ING now claims that it is now entitled to foreclosure on its security
2 interest.

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4 *3. The Nayberger Loan*

5 Valeriy and Dina Nayberger are the owners of real property located at 2908 44th
6 Avenue Northeast, Tacoma, Washington. Messinger Decl. Ex. 4. On May 15, 2008,
7 Valeriy Nayberger obtained a loan from ING for \$780,000. Houlihan Decl. ¶ 17. In
8 conjunction with the loan, he also executed a Note, and he and his wife Dina Nayberger
9 executed a Deed of Trust which provided ING a first priority security interest in the
10 property, which ING duly recorded. Messinger Decl. Ex. 4; Houlihan Decl. ¶ 18, Exs.
11 10 & 11.
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13 Mr. Nayberger defaulted on his loan obligations beginning on August 1, 2008, by
14 failing to make required monthly payments. Houlihan Decl. ¶ 19. As a result, ING
15 accelerated the balance of the loan of \$950,063.74 under the Deed of Trust. Houlihan
16 Decl. ¶ 20, Ex. 12. ING now claims that it is now entitled to foreclosure on its security
17 interest, and that to the extent that Boeing Employee Credit Union claims any interest in
18 the property, such interest is not superior to ING. Messinger Decl. Ex. 4.
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21 *4. The Kozhevnikov Loan*

22 Sergey Kozhevnikov is the owner of real property located at 26916 9th Avenue
23 South, Des Moines, Washington. Messinger Decl. Ex. 5. On November 30, 2007, Mr.
24 Kimenko obtained a \$900,000 loan from ING. Decl. of Thomas Houlihan ('Houlihan
25 Decl.') ¶ 22. In conjunction with the loan, he also executed a Note, and a Deed of Trust
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1 which provided ING a first priority security interest in the property, which ING duly
2 recorded. Messinger Decl. Ex. 5; Houlihan Decl. ¶ 23, Exs. 13 & 14.

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4 Mr. Kozhevnikov defaulted on his loan obligations beginning on October 1,
5 2008, by failing to make required monthly payments. Houlihan Decl. ¶ 24. As a
6 result, ING accelerated the balance of the loan of \$1,105,362.52 under the Deed of
7 Trust. Houlihan Decl. ¶ 25, Ex. 15. ING now claims that it is now entitled to
8 foreclosure on its security interest, and that to the extent Alaska U.S.A. Federal Credit
9 Union and Westsound Bank claim any interest in the property, such interest is not
10 superior to ING. Messinger Decl. Ex. 5.

12 **IV. Discussion**

13 **A. Standard of Review**

14 The Court shall grant summary judgment if no genuine dispute of material fact
15 exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
16 56(a). The moving party bears the initial burden of demonstrating the absence of a
17 genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A
18 fact is material if it might affect the outcome of the suit under the governing law.
19 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In support of its motion
20 for summary judgment, the moving party need not negate the opponent's claim,
21 Celotex, 477 U.S. at 323; rather, the moving party will be entitled to judgment if the
22 evidence is not sufficient for a jury to return a verdict in favor of the opponent,
23 Anderson, 477 U.S. at 249. To survive a motion for summary judgment, the adverse
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1 party must present affirmative evidence, which ‘is to be believed’ and from which all
2 ‘justifiable inferences’ are to be favorably drawn. Id. at 255, 257. When the record
3 taken as a whole, could not lead a rational trier of fact to find for the non-moving
4 party, summary judgment is warranted. See, e.g., Beard v. Banks, 548 U.S. 521, 529
5 (2006).
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7 **A. Judicial Foreclosure**

8 Foreclosure is appropriate where the lender can show a breach of the terms of the
9 promissory note and deed of trust, notice, and failure to cure. See RCW 61.12.040.
10 Here, Borrowers all executed a note in favor of ING and agreed to make monthly
11 payments. Repayment of the notes was secured by deeds on the properties, which
12 Borrowers also executed in favor of ING. Messinger Decl. Exs. 2-5; Houlihan Decl.
13 ¶¶ 8, 13, 18, 23; Exs. 4, 5, 7, 8, 10, 11, 13, 14. Borrowers breached their obligations
14 under the notes when they failed to make required payments. Houlihan Decl. ¶¶ 9, 14,
15 19, 24. Absent any defense, Borrowers’ breach of their deeds of trust, and continuing
16 default and failure to cure, entitles ING to a foreclosure decree. See RCW 61.12.040.
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19 In response to ING’s summary judgment motion, Borrowers argued that ING
20 had not met its burden under Fed. R. Civ. P. 56(a) to show that no genuine issue of
21 material fact exists because Borrowers have unresolved counterclaims for rescission
22 under the Truth in Lending Act (‘TILA’) pending. See Answers, docket nos. 160
23 ¶¶ 26-38 (Anatoliy Tislenok and Vera Tislenok); 161 ¶¶ 24-36 (Oleg and Anastasia
24 Tislenok); 162 ¶¶ 25-37 (Sergey Kozhevnikov and Nadezhda Sedneva); 163 ¶¶ 24-36
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1 (Valeriy and Dina Nayberger). In its Reply, ING responded that Borrowers must
2 demonstrate their financial ability to tender back the loan amount in order to maintain
3 a rescission counterclaim under TILA, citing Yamamoto v. Bank of New York, 329
4 F.3d 1167, 1171 (9th Cir. 2003). Because ING made this argument for the first time in
5 its Reply, the Court directed Borrowers to file proof of their ability to repay their
6 loans, less interest, finance charges, etc., if rescission were granted. The Court
7 notified Borrowers that, “[i]f ‘it is clear from the evidence that the borrower lacks
8 capacity to pay back what she has received, the Court will, with regard to any
9 Defendant unable to prove ability to tender,’ dismiss that Defendant’s counterclaim for
10 rescission under TILA and grant ING’s motion for summary judgment.’” Minute Order,
11 docket no. 335 (citing Yamamoto, 329 F.3d 1167 at 1171). In response to the Court’s
12 Minute Order, the Borrowers admitted that none “have the capacity to repay their ING
13 loans. . . .” Supplement to Opposition 2 (docket no. 344); see also, Decl. of Bruce M.
14 Hull in Supp. of Supplement to Opp’n of Borrowers to ING’s Mot. for Partial Summ. J.
15 ¶¶ 2-3 (docket no. 345).

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19 TILA and its implementing regulations impose obligations on a borrower to
20 return money or property when the borrower exercises the right to rescind. 15 U.S.C.
21 § 1635(b) (“ . . . Upon the performance of the creditor's obligations under this section,
22 the obligor shall tender the property to the creditor, except that if return of the property
23 in kind would be impracticable or inequitable, the obligor shall tender its reasonable
24 value. . . .”); 12 C.F.R. § 226.23(d)(3) (same). The Ninth Circuit has expressly held
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1 that courts have equitable discretion to modify the sequence of rescission events to
2 require borrowers to allege or show (in connection with a summary judgment motion)
3 an ability to repay the loan proceeds *before* deciding whether rescission is warranted.
4 Yamamoto, 329 F.3d at 1173. In Yamamoto, the Ninth Circuit affirmed the District
5 Court's summary judgment dismissal of a borrower's rescission claim where "it is clear
6 from the evidence that the borrower lacks capacity to pay back what she has received
7 (less interest, finance charges, etc.)." See also, Abarquez v. Onewest Bank, FSB, No.
8 C11-29, 2011 WL 1459458, at *4 (W.D. Wash. Apr. 15, 2011) (dismissing TILA
9 claims where plaintiffs did not allege ability to tender the money they received under
10 the loan agreement); McGinley III v. Am. Home Mortg. Servicing, Inc., No. C10-
11 1157, 2010 WL 4065826, at *4 (W.D. Wash. Oct. 15, 2010) (same).

12 The Court elects to exercise its equitable discretion conferred by Yamamoto.
13 Borrowers admit they do not have the capacity to pay back what they have received.
14 Accordingly, the Court dismisses Borrowers' counterclaims for rescission and grants
15 ING's motion for summary judgment.

16 **V. Conclusion**

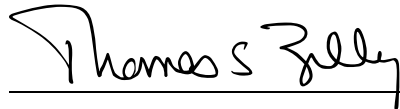
17 Defendants Valeriy Nayberger, Dina Nayberger, Nadezhda Sedneva, Sergey
18 Kozhevnikov, Anastasia Tislenok, Oleg Tislenok, Anatoliy Tislenok and Vera
19 Tislenok's counterclaims for rescission under TILA are DISMISSED. Plaintiff ING
20 Bank's motion for partial summary judgment, docket no. 325, is GRANTED with
21 respect to the following Defendants:
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- 1 (1) Anatoliy Tislenok and Vera Tislenok, and junior lienholder or other party
2 claiming an interest in the property, Watermark Credit Union (Count Twenty-
3 Two of ING's Amended Complaint);
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5 (2) Anastasia Tislenok and Oleg Tislenok (Count Twenty-Three of ING's Amended
6 Complaint);
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8 (3) Valeriy Nayberger and Dina Nayberger and junior lienholder or other party
9 claiming an interest in the property, Boeing Employee Credit Union (Count
10 Twenty-Four of ING's Amended Complaint); and
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12 (4) Sergey Kozhevnikov and his wife Nadezhda Sedneva, and junior lienholders or
13 other parties claiming an interest in the property, Alaska U.S.A. Federal Credit
14 Union and Westsound Bank (Count Twenty-Six of ING's Amended Complaint).
15 Plaintiff shall submit proposed judgments of foreclosure consistent with this

16 Order.

17 IT IS SO ORDERED.

18 DATED this 4th day of November, 2011.

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21 Thomas S. Zilly
22 United States District Judge
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